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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1337

ANTHONY MORELLI, CHARLES LoCICERO
and CARLO LoCICERO,

Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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No. .....

ANTHONY MORELLI, CHARLES LOCICERO
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Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above entitled case on January 20, 1971, —— N.Y.2d —— (not yet officially reported).

A. Opinions Below

An opinion was rendered by the New York State Court of Appeals, which opinion is annexed to the petition as Appendix A.

On appeal from the original judgment of conviction to the Appellate Division of the Supreme Court in and for the Second Judicial Department in the State of New York the judgments of conviction appealed from were affirmed without opinion (314 N.Y.S.2d 337, 338) on July 20, 1970.

There were no other opinions written in connection with the case.

B. The Grounds Upon Which the Jurisdiction of This Court Is Invoked

Jurisdiction in this Court is invoked under Title 28, U. S. Code §1257(3) and Rule 19, Subdivision 1 of the rules of this Court.

The judgment sought to be reviewed herein is the judgment of the Court of Appeals of the State of New York (—— N.Y.2d ——) made on January 20, 1971 as aforesaid.

C. The Questions Presented for Review

1) Was petitioner Morelli deprived of his constitutional right to counsel and his constitutional privilege against self-incrimination by allowing into evidence at the trial the post-arrest statement allegedly made by him to the arresting officer in the circumstances hereinafter described?

2) Were the petitioners Charles LoCicero and Carlo LoCicero deprived of their constitutional right to confrontation by witnesses against them when the aforementioned statement of petitioner Morelli was received upon their joint trial without granting the requested severance?

D. Constitutional Provisions Involved

The constitutional provisions involved are those portions of the Fifth Amendment to the United States Constitution dealing with the privilege against self-incrimination and those portions of the Sixth Amendment to the United States Constitution dealing with the right to counsel and the right to be confronted by witnesses.

E. A Concise Statement of the Case and Material Facts Pertaining to the Consideration of the Questions Presented

Petitioners were jointly indicted and tried along with two others (one Jose Colon and one Carol Rice), upon an indictment charging all of them with the crimes of criminally buying and receiving stolen property as a felony and criminally concealing and withholding stolen and wrongfully acquired property as a felony. Said indictment (#625/1967) was tried by jury in the Supreme Court of the State of New York, County of Kings. All of the defendants were convicted as charged in the indictment. Petitioners Anthony Morelli, Charles LoCicero and Carlo LoCicero were each sentenced to a term of imprisonment of five to ten years on each count to run concurrently.

The conviction of defendant Colon was also affirmed. The conviction of defendant Carol Rice was reversed on appeal to the Appellate Division and the indictment dismissed for insufficiency of evidence. The Court of Appeals upheld the dismissal of the indictment as to her.

Petitioners Charles LoCicero and Carlo LoCicero are presently incarcerated.

Petitioner Morelli is presently at liberty subject to the determination by this Court on an application being filed simultaneously herewith for the continuance of bail pending the determination by this Court of the instant petition. Said petitioner Morelli has been at liberty on bail during the pendency of the State Court appeals hereinbefore referred to.

The basis of the prosecution's case revolved around the testimony of two New York City police detectives, Detective Johanson and Detective Starace. In substance, they testified that they were investigating the theft of a quantity of bonds and other securities which had been taken from a Wall Street messenger. They further testified that in the course of their investigation they received information that the petitioners and their co-defendants were in possession of said bonds and securities. Accordingly, posing as prospective buyers, they had meetings with the petitioners and co-defendants relative to the proposed purchase and sale thereof. Although the securities were never recovered, it was upon the testimony of these two detectives that the convictions below were had.

The detectives, Johanson and Starace, made the arrest of petitioner Morelli. At the time of the arrest of Morelli there were certain statements allegedly made by Morelli to the detectives which were received in evidence at the trial after the Court had held a pre-trial Huntley hearing to determine whether proper *Miranda* warnings were given to Morelli.

The circumstances under which these statements were taken is the subject matter of Point One, *supra*. It is accordingly set forth in great detail thereunder.

Prior to the trial, a motion was made during the course of the pre-trial Huntley hearing for a severance as to petitioners Charles and Carlo LoCicero upon the ground that admission into evidence of the statement allegedly made by petitioner Morelli to the police officer testifying thereto, was prejudicial to the LoCiceros under the doctrine of *Bruton* v. *U. S.*, 391 U.S. 123, 88 S. Ct. 1620. That motion was denied by the trial Court. It is this denial which is the subject matter of Point Two herein and accordingly the details thereof are set forth thereunder.

F. The Stages of the Proceedings in Which the Issues Involved Were Raised and the Manner in Which They Were Raised

The Federal Constitutional issues presented herein were raised at the first available opportunity, as follows:

1. Morelli's objection to the statement allegedly made by him to the arresting detectives was raised by appropriate pre-trial hearing ordered by the Court for that purpose (Point One, *infra*).

2. LoCiceros' application was raised by pre-trial motion for a severance predicated upon the doctrine announced by this Court in *Bruton* v. *U. S.*, *supra.*

Each of the aforementioned issues were also raised on the appeals in the New York Appellate Division and in the New York Court of Appeals.

POINT ONE

The post arrest statements of appellant Morelli were received in evidence upon the trial in violation of his constitutional right to counsel and his privilege against self-incrimination.

Prior to the commencement of the trial a Huntley heàring was held to determine the admissibility in evidence of certain statements allegedly made by petitioner Morelli following his arrest.

The evidence adduced by the prosecution in this regard may be summarized as follows:

Petitioner Morelli was arrested by Detective Johanson on September 20, 1966 at a bar in Brooklyn.

At the time of his arrest, the following occurred, according to the People's witness, Detective Johanson, on direct examination:

> "Q. You say you saw him at the bar, is that correct? A. That's right.
>
> Q. Now, did you say anything to him when you saw him? A. I did.
>
> Q. What did you say? A. He was sitting at the far end of the bar—it's a long bar running along the right hand side of the building as you walk in, and I walked in with Detective Starice and I said, 'Tony, you're under arrest.' I said, 'You have a right to an attorney.'
>
> Q. Who were you talking to when you said, 'Tony, you're under arrest'? A. Tony Morelli.
>
> Q. What did you say to him? A. I said, 'You have a right to an attorney; anything you say can be used

against you and if you don't have an attorney, one will be furnished to you'—and he put down his half finished drink and started to walk out. I said, 'No, we're going to search the place first.' We then prorceeded (sic) to search the place with him under arrest, looked behind the bar.

Q. Now, we're not concerned with that at that time. After you say—did you tell him anything else with reference to his rights? A. I said he doesn't have to say anything, he has a right to remain silent, he has a right to an attorney, to any portion of the questioning; he has a right, if he doesn't have an attorney to have one appointed by the court, and he doesn't have to say anything because it can be used against him.

Q. Did he say anything to that? A. He says, 'I know; I've been through that.'

Q. And then what happened? A. I then said to him that we have already arrested the girl and the fellow who took me to the barber shop, and he says, 'Can't you let the girl go? She doesn't know anything about this,' and I said, 'Well, if we can get the securities back we can let a lot of people go.' He says, 'You know I don't have control over that.'

Q. That was the extent of the conversation, is that correct? A. That's right.

Q. Then he was taken into custody? A. That's right, he was in custody at the time."

Johanson further stated on cross-examination that apart from declining Morelli's offer of a drink, there was no further conversation, and Johanson then took Morelli to the police station.

It was conceded by the District Attorney that at the police station, two hours later, an Assistant District Attorney advised petitioner of his constitutional rights and petitioner declined to answer any questions at all.

Upon cross-examination, Johanson stated that his warning to Morelli was given as follows:

> "'Q. Detective, when you were in this bar and you placed Mr. Morelli under arrest, I think you said that you went in and he was having a drink— A. That's right.
>
> Q. And you notified him of the fact that he was under arrest? A. That's right.
>
> Q. Now, did you tell him what crime he was under arrest for? What did you say to him, exactly? A. I said, 'You're under arrest, Tony.' He says, 'I know.'
>
> Q. What was said then? A. Then he starts to put down the drink and I said, 'Finish your drink; we're going to search the bar and I want to advise you of your rights. You have a right to an attorney; you don't have to answer any questions; anything you say can be used against you. If you can't afford an attorney, one will be furnished for you and if you want to question or waive this—' he says, 'I know, I've been through that.'"

Johanson further stated that in the bar Morelli was asked if he had a lawyer or wanted one appointed for him, to which Morelli replied in the negative.

No notes were made by Johanson of the conversation at the bar.

Detective Johanson is also an attorney admitted to practice in New York since 1955.

The prosecution then called Detective Starace who was present when Detective Johanson arrested Morelli. Starace testified as to the circumstances of the arrest and the ensuing statements by Morelli, as follows:

> "The Court: The answer was not responsive. He has testified to a conclusion—'he advised him of his rights.' He advised him of what rights? We want to know, what rights? We want to know, what did he say?
>
> The Witness: He said to him, 'You're under arrest.'
>
> *By Mr. Ernst*:
>
> Q. Go ahead. A. 'I want to advise you of your rights. You have a right to remain silent; you have a right to a lawyer. Do you wish to make a statement? No.' That was the end. Detective Johanson then stated, 'We arrested Carol Rice' and Morelli answered—
>
> The Court: Do you want the whole conversation?
>
> Q. Go ahead. A. He said, 'Let her go; she had nothing to do with it.' I then walked away and made a search of the premises looking for the bonds.
>
> Q. That's as far as you remember, is that right? A. Yes.
>
> Q. You say you made no notations of that? A. No notes."

The Court denied petitioner's motion to suppress Morelli's statements from introduction into evidence at the trial. Exception was taken to that ruling. The statements were subsequently received in evidence against him upon the trial.

It is our contention herein that the detective's warning to petitioner fell fatally short of fulfilling the constitutional mandates imposed by the United States Supreme Court in *Miranda* v. *Arizona,* 384 U.S. 436, 86 S. Ct. 1630.

In the latter case, the basic principle of constitutional law was promulgated as follows:

> "[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.' 384 U.S. at 478-479; 86 S. Ct. at 1630."

Thus, *Miranda* made it imperative that a person arrested be warned as to four basic constitutional rights:

1. The right to remain silent;
2. That anything he says may be used against him in a Court of law;
3. That he has the right to the *presence of an attorney;*

4. That if he cannot afford an attorney, one will be appointed for him *prior to any questioning* if he so desires.

Examining the various versions of the warning as given by Detective Johanson, it becomes apparent that of these four basic requirements, the latter two were never told to petitioner.

With respect to the right to have an attorney *present,* petitioner was never told that he had such a right. The most that can be said of Johanson's testimony is that he told petitioner that he had "a right to an attorney to any portion of the questioning." This equivocal type of warning has been held to be insufficient as a matter of law.

In *U. S.* v. *Fox,* 403 F.2d 97, 99 (2 Cir. 1968), the following warning was given to the defendant upon his arrest:

> "That he didn't have to make any statement; that any statement he made could be used in a court of law and he could consult an attorney prior to any question."

The U. S. Court of Appeals held the warning to be inadequate and reversed the conviction, saying at page 100:

> "Miranda requires that the accused be told that 'he has the right to the presence of an attorney,' plainly meaning to have an attorney present at the interrogation. Fox was told 'he could consult an attorney prior to any question.' There was no indication given to him that he had the right to have an attorney present *during* the interrogation." (Italics ours.)

Thus, the warning by the detective failed to inform petitioner that he could have an attorney actually *present* during any questioning. The vagueness of the warning itself militates against a finding that petitioner's privilege against self-incrimination was "scrupulously honored" (*Miranda, supra*). In any event the ill-chosen phraseology employed by the detective (who was also a member of the bar) cannot be fairly taken by a layman to mean anything more than the right to *consult* an attorney at some time *prior* to interrogation. The right to the actual presence of an attorney *during* any interrogation was never told to petitioner.

With respect to petitioner's right to have an attorney appointed to him *prior* to any questioning, the proffered warning again went far below the minimum standard enunciated by *Miranda*. Indeed, it went directly contrary to the path designated by *Miranda*.

The focal point of *Miranda* was to advise the accused of his inexorable right to have counsel when he needed it most —*before* the custodial pressures were brought to bear upon him.

Johanson, however, placed the right to counsel into the future by informing petitioner that if he had no attorney "one *will be* furnished" and then compounding the error by advising petitioner that "he has a right, if he doesn't have an attorney to have one appointed *by the Court.*" The latter elucidation left no doubt that the constitutional right to the assistance of counsel would commence not immediately, but *in futuro*—when the case was called to the attention of a Court.

Miranda, of course, tolerates no such hiatus of time. To the contrary, the Court's proscription is simple and unequivocal: ". . . an attorney will be appointed for him *prior to any questioning* if he so desires" (384 U.S. at page 479, 86 S. Ct. at page 1630; italics ours).

Moreover, the prosecution's evidence, as presented, was inherently insufficient in yet another aspect. The burden of proof was upon the prosecution. Yet their own witnesses were in disagreement as to what warnings were actually given to petitioner.

Detective Starace, the second and final witness called by the prosecution, was present with Johanson when Morelli was warned. He described Johanson's warning as follows:

> "I want to advise you of your rights. You have a right to remain silent; you have a right to a lawyer. Do you wish to make a statement? No.' That was the end."

It requires no further elaboration to point out (*id.,* at 384 U.S. 479, 86 S. Ct. 1630):

> ". . . unless and until such warnings and waiver are demonstrated *by the prosecution* at trial, no evidence obtained as a result of interrogation can be used against him . . ."

At bar, apart from the inadequacy of either version of the warnings, the testimony of the witnesses produced by the prosecution was so mutually contradictory as to have rendered it, in its entirety, devoid of probative value. As such the prosecution failed to meet its burden of proof.

It is, therefore, respectfully urged that the prosecution failed to establish that the post-arrest statements made by

Morelli were admissible against him upon the trial. It was, therefore, reversible error to have allowed the statements to be considered by the jury.

POINT TWO

The trial court below violated the constitutional right to confrontation of witnesses of petitioners Charles and Carlo LoCicero by denying their motion for a severance under *Bruton* v. *U. S.*, 391 U.S. 123, 88 S. Ct. 1620.

A post-arrest statement allegedly made by the petitioner Morelli was offered in evidence.

Prior to the statement being offered, a Huntley hearing was held. The question of the propriety of the introduction of the statement is treated at Point One, *supra*. Reference, however, is made to the minutes of that hearing for it was during this hearing that counsel for both LoCiceros made a motion for a severance. The application was made upon the authority of *Bruton* v. *U. S.*, 391 U.S. 123, 88 S. Ct. 1620.

The statement attributed to petitioner Morelli was allegedly made at the bar at the time of his apprehension. The statement of Morelli as testified to by Detective Johanson is set forth:

> "Q. And what is the next thing that was said in the course of this conversation? A. I said to him, 'We have the girl and that fellow who took me to the bar and the other two guys already under arrest' and he said to me, 'Can't you let her go? She knew nothing about it.' I said, 'Well, if we can get some paper back, if we can get the stocks back there's a good chance

we can work something out and let a couple of people go.' He says, 'You know I don't have control over that.'"

At the conclusion of the Huntley hearing the motion for a severance was made. The Court denied the motion for a severance. In doing so, the Court based its decision on the fact that no defendants were mentioned by name.

The statement then appears in the trial transcript of Detective Johanson's testimony. In substance, it is the same as the statement hereinbefore set forth. It was repeated again in substance upon cross-examination. As previously indicated, the basis of the Court's denying the severance was, of course, the fact that no names are mentioned in the statement. It becomes quite apparent that this is an oversimplified view of the problem. It must be remembered that at this point the jury has been told by the witness that Carlo LoCicero, the fellow who drove him to the barber shop is in custody. Thus, by implication, the statement that the girl (Carol Rice) had nothing to do with it clearly indicates that Carlo LoCicero must have something to do with it. Additionally, when he (Morelli) allegedly said you know I don't have control over that (return of the bonds), he was clearly referring to the two LoCiceros. They were as clearly highlighted by that statement as if they were named. It should be remembered that testimony was now before the jury that the box which allegedly contained the securities was last given to Charles LoCicero who drove away with them. Is it difficult to imagine that a jury would believe that the last person who had them, had control over them was none other than Charles LoCicero?

Johanson also testified that Carlo LoCicero took the box and gave them to Charles LoCicero. Does this not point to his control over them? Couple this with the testimony that (a) Carlo told Morelli to try the number again; (b) Carlo said there was a change in plans, give the box to Charles. This clearly points the finger to Carlo LoCicero as the other party who has control.

In addition to all of this, the testimony of the witness Johanson on this point clearly eliminates any of the other persons from having control, viz., Carol Rice is stated as having no part, Colon is stated merely as a broker, the deceased Massieri is stated as being merely an introducer. Thus, by elimination, who else is left as being referred to as being in control except the LoCiceros? It is respectfully submitted that for all these reasons the statement referred to the LoCiceros as patently as if they were in fact named.

The Court in its charge in referring to the post-arrest statement, stated:

> "Now, ladies and gentlemen, a statement made by any of the defendants, as I said to you, at the time of his or her arrest are, if you are convinced beyond a reasonable doubt that the statement was made, is binding on that person who made the statement."

This is the only way the Court treated the alleged post-arrest statement of Morelli and its effect upon the LoCiceros.

In the landmark case of *Bruton* v. *U. S.*, 291 U.S. 123, 88 S. Ct. 1620, this Court held that despite instructions to the jury to disregard one defendant's statement as binding

upon another, nevertheless, the defendant so implicated was deprived of certain constitutional right. The right he was deprived of was his Sixth Amendment right of cross-examination via confrontation of witnesses.

This violation of the right to confrontation of witnesses stemmed, of course, from the fact that the party who allegedly made the statement does not take the stand. In the instant case, Morelli did not take the stand.

All of the post-*Bruton* cases, both in the Federal and State Courts, have held that the procedure for handling a confession that inculpates another defendant is either to grant a severance or redact the statement.

People v. *Cefaro,* 23 N.Y.2d 283 (1968):
People v. *Jackson,* 22 N.Y.2d 446 (1968).

This has been the holding even where the Court has taken great pains with admonitions and cautionary warnings. At bar there were, of course, no such extensive admonitions. There was merely the general statement alluded to in the charge and at the time the statement was admitted in evidence.

There was no attempt to redact the statement and as previously indicated, the severance was denied. The Court in its rationale in denying the motion for severance determined both as a matter of law and fact that the statement did not specifically identify other defendants by name. The factual fallacy of this contention was pointed out at an earlier point in this brief. The contention was also legally fallacious. It is no different than the result of attempts made in some cases to obscure the names of the defendant

by the use of letters. This practice was referred to in *People* v. *Jackson (supra)* at page 268:

> "In the case before us, despite the use of letters as substitutes for names, each defendant was, to cull from our opinion in Burrelle (21 N.Y.2d, at p. 269, 287 N.Y.2d, at p. 383, 234 N.E.2d 431); 'unmistakably identifiable to the jury.' The names represented by the letters were easily ascertainable not only from the statements themselves but, as noted, from the testimony of the witnesses and the comments of the trial judge."

This language is applicable at bar. For the defendants LoCicero were "unmistakably identifiable to the jury" by virtue of the testimony and all of the surrounding circumstances.

In addition to this, moreover, it should be noted that in this case where the evidence was so highly circumstantial, this statement had to weigh heavily upon the minds of a jury.

CONCLUSION

The writ of certiorari herein prayed for should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the New York Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

No. 541

THE PEOPLE &C.,

Respondent-Appellant,

VS.

JOSE COLON, & ORS.,

Appellants,

and

CAROL RICE,

Respondent.

SCILEPPI, J.:

Defendants, Colon, Lo Ciceros and Morelli appeal from separate judgments of the Appellate Division, affirming judgments convicting them, after a jury trial, of criminally buying and receiving stolen property and of criminally concealing and withholding stolen property as felonies. As to the fifth named defendant, Carol Rice, the People appeal from a separate order reversing a judgment of conviction on the same charge and dismissing the indictment.

On August 16, 1966, Richard Lo Cicero, a runner for the brokerage firm of Paine, Webber, Jackson and Curtis (hereinafter Paine-Webber), left his employer's place of business with various stocks and bonds, valued in the aggregate

at some $370,000, for delivery in the normal course of his duties to four other brokerage firms and the Grace National Bank, all located in the immediate Wall Street area. As the record indicates the five firms to which the securities were to be delivered never received them, nor were the securities or the receipts therefor returned to Paine-Webber. Curiously, Lo Cicero failed to return to work that day and on the following day, August 17, a flyer, listing the quantity, description, and serial numbers of the stocks and bonds which had disappeared, was circulated among banks and brokerage houses in the financial district.

Prior to September 16, 1966, Detectives Hans Johanson, a bond expert, and Peter Starace were assigned to investigate the loss of the securities. On September 16th, at about 10:00 p.m., Starace met with defendants Colon and Masciana (now deceased) for the first time to discuss the purchase of certain securities. According to his testimony, Detective Starace posed as a prospective purchaser and requested that he be supplied with a sample of the securities for his bond expert's appraisal. The defendants cautiously refused the request and suggested an appointment for the following day, at which time the "bond man" could examine the securities himself.

Pursuant to that agreement, Starace, accompanied by Johanson, met with Colon and Masciana. Starace introduced Johanson as his bond expert, whereupon the defendants suggested a price of $125,000. Johanson, intent upon playing out his role, hesitated and insisted on examining the bonds before considering any offer. Acceding to this request, Masciana left the group to schedule an appointment. While he was gone Colon assured the investigating detectives that he had already seen the bonds and they were "treasures" which had been stolen from a messen-

ger on Wall Street about a month before. When Masciana returned, an appointment was made for 9:30 a.m. on September 20th, at which time the securities would be available for inspection.

On Tuesday, September 20th, Detectives Johanson and Starace again met with the above defendants, who, in turn, were subsequently joined by defendants Morelli and Charles Lo Cicero. Pursuant to planned arrangement, defendant Morelli drove Johanson, via an obviously circuitous route, to an apartment located at 725 Fourth Avenue in Brooklyn. Upon gaining entry to the apartment by way of an unlocked door, Morelli produced a cardboard box containing bundles of securities. Johanson then took the flyer listing the reportedly missing securities from his pocket and with Morelli's assistance examined the securities to determine if they were genuine. With the aid of that paper, Johanson later testified that the securities corresponded by issue and serial number with the securities listed on the flyer as reportedly missing. Having completed his examination Johanson then explained that since the securities were "municipals" rather than "treasuries," they did not have the resale value of Government bonds and consequently the original demand of $125,000 would have to be reduced to $100,000. After some discussion, Morelli stated that the offer was subject to the approval of Colon, who was to get everything above $95,000. Accordingly, Morelli retired to the bedroom where he made a telephone call.

Shortly thereafter, about 11:15 a.m., Colon arrived. Johanson explained to Colon that since the securities were not Federal securities but merely municipal and state bonds the price had to be reduced to $100,000. After some additional discussion, Colon agreed to the reduced price

of $100,000. Morelli then agreed to escort Johanson to a barber shop at Douglas and Smith Streets where the proposed exchange would take place. Johanson made a telephone call from the apartment to a pre-arranged pay station in the Long Island Railroad Depot for the purported purpose of arranging to have the money delivered to the barber shop. Colon departed and was followed shortly by Morelli, who left Johanson behind in the apartment with the box of securities. In the meanwhile Colon and Masciana were arrested.

After the arrests, Detective Starace telephoned Johanson at the apartment and informed him that Colon and Masciana had been arrested. Johanson then attempted to leave with the box of securities, but on reaching the street floor of the premises he was met by five or six men, including the two Lo Ciceros, Charles and Carlo, and Anthony Morelli, whereupon he was relieved of the box. Johanson was then driven to the barber shop, where Carlo Lo Cicero was arrested. Shortly thereafter, Johanson and Detective Starace arrested Morelli in a local bar. Charles Lo Cicero was the last defendant to be arrested on October 12, 1966.

Of the plethora of questions raised on this appeal, some refer, in part, to the nature and quantum of proof required to support a conviction under former Penal Law, section 1308; others relate to alleged infringements of certain constitutional rights. As our abbreviated statement of the facts would indicate, our present concern relates primarily to the questions raised regarding the nature of the statutory offense. Accordingly, we have chosen to treat with only those specific issues, omitting reference to all others in our opinion.

Defendants collectively argue that the prosecution failed to prove beyond a reasonable doubt that the property had

been previously stolen or wrongfully acquired by another. The question of law, therefore, relates to the quantum of proof necessary to support a conviction of the crime of criminally buying, receiving, concealing and withholding stolen property pursuant to former Penal Law § 1308. As defendants note in their brief, to sustain a conviction under this section, it is essential that there be three concurring facts: (1) The property must have been stolen by someone; (2) it must have been bought, received, concealed or withheld by a certain person; and (3) such person must have known that the property was stolen (*People* v. *Walker*, 198 N. Y. 329). Each and every element, however, of the crime may be established by either direct or circumstantial evidence (*People* v. *Berger*, 285 N. Y. 811; *People* v. *Nazar*, 305 N. Y. 751). In the present case, the prosecution concededly lacked any direct evidence that the securities in question were in fact stolen, and proceeded upon circumstantial evidence. The prosecution sought to prove the theft by establishing two factors: (1) That the brokerage house which had custody of the securities, entrusted them to its messenger with instructions to deliver the same to specified banks and brokerage houses; and (2) That the proposed recipients never received the securities. Again, as to the circumstances under which they left the possession of the messenger, the record is devoid of any evidence, either direct or circumstantial. We simply have established by all relevant testimony the fact of non-delivery and nothing more. Assuming the truth of the non-delivery, the question is whether there was enough evidence, as a matter of law, to warrant a jury finding beyond a reasonable doubt that the securities were stolen in the first instance. Defendants argue there was not. We disagree.

True, there is no direct evidence of the theft. However, the circumstances are clearly such as to provide an adequate basis for the inference that there was such a theft, whether it had been committed by the messenger himself, one or all of the codefendants herein, or by some third party whose possible existence simply deepens the mystery of their disappearance. Surely $370,000 worth of securities do not by their own resources work their way into the possession of six individuals in Kings County. Of course, the proof is not beyond any doubt at all, and it is entirely conceivable that there is some other explanation for the disappearance; but no other such explanation is suggested here. While we do not suggest that the defendants are under an obligation to come forward and exculpate themselves, it should be recognized that the jury could reasonably infer from the circumstances surrounding the unexplained disappearance that the securities were in fact stolen. Two cases decided by this Court would seem to support this conclusion.

In *People* v. *Berger* (285 N. Y. 811) a quantity of rubber thread contained in a large wooden packing box mysteriously disappeared. The box, with others, was on a truck for delivery, but in the course of its route about a city, was noted missing by the truck driver. After the loss had been reported to the police, a policeman found the defendant unpacking this same box on a sidewalk about two miles from where the box had been reported missing. Defendant told the policeman that he was looking around for a packing case and had found this one on the sidewalk, an unlikely story inasmuch as the secured tailboard would prevent against its slipping out. It was claimed, among other things, on appeal to this Court that there was insufficient evidence that the property had been stolen by anyone,

that is, the same claim argued on the present appeal. We held that this was properly a question of fact for the jury and although there was no direct evidence of an underlying theft, the circumstances were such as to make such an inference possible (*People* v. *Berger,* 285 N. Y. 811).

Similarly, in *People* v. *Nazar* (305 N. Y. 751) the People sought to establish by circumstantial evidence the commission of the underlying theft as a predicate for a violation of section 1308. Again there was no direct proof of the underlying theft. Following *Berger,* we held that the question of the underlying larceny was properly one for the jury and affirmed the conviction.

Additionally, the independent statements of defendants Morelli and Colon that the certificates were "taken" from a Wall Street messenger, when considered in light of additional, although circumstantial, proof that the theft had been committed (see *People* v. *Cuozzo,* 292 N. Y. 85, 92), are sufficient under section 395 of the Code of Criminal Procedure to warrant a conviction for the underlying theft (CCP § 395; see also, *People* v. *Jaehne,* 103 N. Y. 182, 199). The requirement of additional proof is satisfied by the testimony of various witnesses tending to show that the securities entrusted to the messenger were never delivered to the designated recipients or returned to Paine-Webber and by the inference of guilt arising from the defendants' recent, exclusive and unexplained possession of the securities (see *People* v. *Cuozzo, supra* at 92; *People* v. *Jaehne, supra* at 199). Clearly, if the defendants Morelli and Colon could be convicted under section 395 of the underlying theft on the basis of these admissions, the admissions, when supported by additional evidence of the commission of the crime, could equally serve as a basis for establishing the theft as an element of the crime.

Defendants further contend that it was error for the trial court to instruct the jury that it could consider a violation of section 1300 of the former Penal Law[1] as the underlying larceny upon which the charge of receiving or possessing stolen property was predicated. That contention is founded upon the ground that the prosecution is alleged to have failed to offer evidence seeking to establish that particular species of larceny. Indeed, it is argued that the matter was first raised in the prosecutor's summation, wherein he noted that the jury could find that the property was lost and wrongfully acquired by an unknown finder. The record, however, as defendants readily concede, belies this very contention. It is to be noted that the court, over objections, allowed the People to refer to the section 1300 violation only after the question of lost property was first alluded to by counsel for the defense in his summation. Surely, where the defense chooses to interject the possibility that the property could in fact have been lost, the prosecution may properly comment on that possibility and inform the jury that the appropriation of lost property may, in certain instances, of itself constitute the underlying larceny upon which the crime of receipt is predicated. As that issue was introduced into the case, it was certainly proper for the court to instruct the jury that it could find a violation of section 1300 as the predicate of the underlying felony.

Assuming that the court properly charged the jury as to the availability of section 1300 as the predicate of the

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[1] §1300. Appropriating lost property.

A person, who finds lost property under circumstances which give him knowledge or means of inquiry as to the true owner, and who appropriates such property to his own use, or to the use of another person who is not entitled thereto, without having first made every reasonable effort to find the owner and restore the property to him, is guilty of larceny.

underlying felony, it is urged, nevertheless that there was insufficient evidence from which the jury could properly find that the larceny arose under section 1300. As to this contention, suffice it to say that from the facts as adduced at trial the jury could properly find on the basis of the circumstantial evidence presented that the larceny arose under section 1300. Defendants' listing of the four elements of the offense, to which they find a lack of evidence, is surely rebutted by the facts as presented in the record and the inferences which could reasonably be drawn therefrom.

Defendants further argue that under an indictment pursuant to section 1308 it is incumbent upon the prosecution to establish beyond a reasonable doubt that the property was not stolen by the accused (*People* v. *Funkhauser*, 23 A D 2d 955). Indeed, they would have us hold that the property must be shown to have been either stolen by a person other than the defendants or acquired by a person other than defendants in manner constituting a larceny as defined in Chapter 122 of the former Penal Law. A reading of the relevant statutory provisions establishes no such requirement, nor has our research disclosed any authority for the proposition beyond that cited above by the defendants in support of their position.

Preliminarily, it should be noted that section 1308, as structured, gave rise to innumerable problems of construction, not the least of which related to instances wherein the receiver or withholder was also implicated in the theft of the stolen property. It is clear that while one could properly be indicted for both larceny and the crime of receiving stolen property, an active participant in the larceny could not be convicted of "receiving" property which he himself had stolen (*People* v. *Daghita*, 301 N. Y. 723, re-

argument denied 301 N. Y. 744). The crimes are, for purposes of conviction, therefore, held to be mutually exclusive and defendants would have us infer that before one can be convicted on a charge of receiving stolen property, it is essential that there be some evidence tending to show that defendant was not the thief. This, however, is not the law.

It is the law that the recent and exclusive possession of the fruits of a crime, if unexplained or falsely explained, will justify the *inference* that the possessor is *a criminal*. That statement of the law, so well expressed by Judge Cardozo in *People* v. *Galbo* (218 N. Y. 283, 290), has been applied most frequently in cases involving burglary (*Knickerbocker* v. *People*, 43 N. Y. 177) and larceny (*Stover* v. *People*, 56 N. Y. 315) and receiving stolen goods (*Goldstein* v. *People*, 82 N. Y. 231). However, as Judge Cardozo so cautiously noted, "Only half of the problem . . . has been solved when guilty possession fixes the identity of the offender. There remains the question of the nature of his offense. Here again the facts must shape the inference. Is the guilty possessor the thief or is he a receiver of stolen goods" (id. at 291). The question is a hard one and to resolve it we must steadily bear in mind that the inference of guilt to be drawn from possession is never one of law (id. at 291). Indeed, the standard is necessarily a fluid one and we must consider all the circumstances of a given case before finally opting for one result or another.

As we noted in *People* v. *Daghita* (*supra* at 228) a defendant may, of course, be indicted for both the crime of larceny and the crime of concealing and withholding. It is, however, properly for the jury to determine whether the defendant is guilty, as a thief, of the larceny or, as a non-thief, of concealing and withholding (id.). This reasoning, it may be suggested, tends to beg the question, as it relates

to the inference to be drawn from facts establishing the defendant's recent, conscious, exclusive and unexplained possession of the fruits of a crime. To the contrary, the very fact that the defendant may, depending upon the circumstances of the case, be convicted of either the underlying larceny or of "receiving" demonstrates, implicitly at least, that the prosecution need not establish beyond a reasonable doubt that someone other than the present defendants committed the theft (see *Goldstein* v. *People*, *supra*; *People* v. *Berger*, *supra*; *People* v. *Galbo*, *supra*; *People* v. *Daghita*, *supra*; *People* v. *Everett*, 10 N Y 2d 500; *People* v. *Moro*, 23 N Y 2d 496). The law, it seems, points to the contrary and where the prosecutor introduces evidence tending to establish (1) that the articles were stolen; (2) that they were in the possession of the defendant; and (3) that the defendant knew that the property had been stolen, he has made out a prima facie case and the question of defendant's culpability is properly for the jury to decide (*People* v. *Walker*, 198 N. Y. 333; *People* v. *Berger*, *supra*). Should it be established that the defendant is in fact guilty of the principal offense, an indictment charging receipt would properly be dismissed (*People* v. *Daghita*, *supra*). This is indeed a far cry from holding that the prosecution, as part of its case, must establish that someone other than the possessor committed the theft.

What we have therefore, is simply this: The recent and exclusive possession of the fruits of a crime, if unexplained (as surely is the present case) or falsely explained, will justify the inference that the possessor is a criminal. Whether the defendant is to be convicted as a thief or as a receiver, under an indictment charging both, is a question of fact for the jury to determine. Where, however, he is charged only as a receiver and the evidence adduced at

trial establishes his guilt as a thief, the indictment charging the former offense should be dismissed. Since there was evidence that the property was stolen, that, from the circumstances in the case, it might properly be inferred that the defendants had knowledge that the goods were stolen and that they received them from the thief and the evidence showed that they were in actual possession of the stolen goods, it was proper for the court to submit to the jury the question of the defendants' guilt upon the charge of having received stolen property. If there was evidence upon which the jury might find either the defendants had stolen the property or that they had received it from the thief, the question as to which offense the defendant was guilty, was a question of fact for the jury to determine (*People* v. *Berger, supra; People* v. *Galbo, supra*). Accordingly, the question of whether the defendant is guilty of the theft is relevant, not as part of the People's case, but to the ultimate question of his guilt on the crime charged. Here, the jury convicted the defendants of receiving stolen property and in so doing must be presumed to have considered and rejected the possibility of their involvement in the underlying theft, for as we noted in *Daghita* "a thief may not be convicted under section 1308 of the Penal Law of 'buying' or 'receiving' the very goods he himself had previously stolen" (*People* v. *Daghita, supra* at 225). Strictly speaking, therefore, that a person other than the named defendant is guilty of the underlying theft is not an element of the prosecution's case but rather presents a preliminary question of fact for the jury's determination. To hold otherwise and require more would be to resurrect the philosopher's donkey who starved to death because he

could not choose between two utterly equal and delectable bales of hay.[2]

Finally, defendant Colon argues that the People's proof "in support of Count One was insufficient as a matter of law on the issue of venue" and in support thereof relies on *People* v. *Spivak* (237 N. Y. 460). In that case the defendant was convicted in the Court of General Sessions of the County of New York of receiving stolen property in New York and was acquitted on a second count contained in the indictment charging him with larceny. The evidence adduced showed the automobile in question to have been stolen in New York County and sold several days later by the defendant to a garage in Kings County. This Court affirmed, holding that there was no proof of possession by the defendant in New York County, especially since he had been acquitted of the larceny alleged to have been committed in New York:

> We know that the defendant had possession in the county of sale. If participation in the larceny be excluded, we have no reason to believe that he had possession anywhere else. (id. at 462.)

It is indeed true that the form of section 1308 of the former Penal Law, structured as it was to provide for two distinct crimes, gave rise to some curious problems, not the least of which related to vexing jurisdictional ques-

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[2] These and other difficulties are eliminated by section 165.60 of the revised Penal Code which provides:

In any prosecution for criminal possession of stolen property, it is no defense that:

2. The defendant stole or participated in the larceny of the property; provided that a person may not be convicted of both larceny and criminal possession of stolen property with respect to the same property.

tions in cases where the receiving occurred in one jurisdiction and the property was then taken to and "concealed" or "withheld" in another. Cases such as *People* v. *Barsh* (281 App. Div. 1042, app. dismissed, 306 N. Y. 650) and *People* v. *McClean* (243 App. Div. 578) typify these problems. In the instant case, however, there was no proof of possession or receipt by defendants in New York County. The defendants were found in possession of the securities and attempted to sell the same in Kings County. Thus, unlike cases such as *Barsh* (*supra*) and *McClean* (*supra*) there was no evidence that defendants actually received the stolen property in another county (see also, *People* v. *Zimmer*, 174 App. Div. 470, aff'd. 220 N. Y. 597) and unlike *Spivak* (*supra*) the defendants were not tried in a county other than the one within which they were found in possession. *Spivak* simply stands for the proposition, asserted and reasserted by this Court, that receiving is a local offense and must be tried in the county where the receipt took place (*People* v. *Fein*, 292 N. Y. 10; *People* v. *Zimmer*, *supra*). In *Wills* v. *People* (3 Park Crim. Rep. 473) the attempted sale of stolen goods by sample from a pawnshop was held to justify an inference that criminal receipt took place in the county of the attempted sale. That case is dispositive here (see also, *People* v. *Wieczorek*, 11 A D 2d 898). That the property was found in defendant's possession in Kings County, would justify the inference that the receipt took place in that county. *Spivak* in no way contradicts that elementary proposition.

We have considered each and every other argument raised by the defendants and find them to be equally without merit.

Accordingly, the judgments and order appealed from should be affirmed.

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Judgments and order affirmed. Opinion by Scileppi, J. All concur.

APPENDIX B

Fifth Amendment to the United States Constitution

"No person * * * shall be compelled in any criminal case to be a witness against himself * * * ."

APPENDIX C

Sixth Amendment to the United States Constitution

"In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; * * * and to have the Assistance of Counsel for his defence."